Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 402(b)(1)(A)	)	CC Docket No. 96-187
of the Telecommunications Act of 1996	)	

COMMENTS OF McLEOD TELEMANAGEMENT, INC.

McLeod TeleManagement, Inc. ("McLeod"), by its undersigned counsel, hereby submits its comments on the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding (FCC 96-367, released Sept. 6, 1996).

I. INTRODUCTION AND SUMMARY

McLeod, founded in 1993, is a relatively small competitive carrier providing local and long distance communications services to business and residential customers primarily in smaller cities and towns in the Midwest, initially in Illinois and Iowa. McLeod aggregates services and facilities provided by local exchange carriers ("LECs") and interexchange carriers ("IXCs") and provides its business customers with enhanced telecommunications services, including a single point of contact for all of a customer's telecommunications needs. McLeod is a direct competitor of several incumbent LECs as a Centrex reseller/aggregator. By the nature of its business, McLeod frequently must rely on the tariffed services of LECs for origination and termination of interstate calls, and therefore may be significantly affected by interstate tariff filings of these carriers.

McLeod supports the FCC's efforts to implement Section 204(a)(3) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, but urges the Commission to

carry out this duty in a way that does not undermine its ability to scrutinize LEC tariff filings and to provide effective remedies in cases where those tariff filings prove to be unlawful. "Streamlined" review of tariffs should not mean "no review at all," especially where the tariffs are filed by entities that are still classified by this Commission as dominant carriers in recognition of their market power. McLeod therefore opposes an interpretation of "deemed lawful" that would limit customers' substantive remedies, and instead urges that this phrase be interpreted only as placing the burden of persuasion on parties seeking suspension of a tariff. McLeod also supports a strict interpretation of Sec. 204(a)(3) so that the 15- and 7-day notice periods apply only to rate increases and decreases, respectively, and not to changes in terms and conditions.

Streamlined filing should not be permitted to become a "back-door" for tariffs that are inconsistent with established Commission policies. Therefore, filing carriers should be required to disclose any inconsistency between a tariff and existing Commission rules, orders, or policies, as well as any pending proceedings that might affect the tariff.

The Commission should not foreclose pre-effective review of streamlined tariffs, either as a policy or a practical matter. The Commission therefore should adopt an electronic tariff filing system to speed public access to tariff information, and should retain the flexibility to conduct pre-effective review of particular tariffs when warranted.

II. THE COMMISSION SHOULD NOT INTERPRET SECTION 204(a)(3) AS LIMITING CUSTOMERS' REMEDIES FOR VIOLATIONS OF THE ACT (*NPRM* SECTION III)

In Section III of the *NPRM*, the Commission requests comments on interpretation of the phrase "deemed lawful" in Section 204(a)(3) of the Communications Act. McLeod urges the

Commission to reject the interpretation suggested in paragraphs 8-11 of the *NPRM*, under which the Commission would be precluded from awarding damages for the period that a streamlined tariff is in effect before a determination that the tariff is unlawful. As the Commission itself noted in paragraph 10, the case law regarding "lawful" rates under the Interstate Commerce Act arose in cases in which the agency had conducted an investigation and affirmatively determined a rate to be lawful. It strains credulity that Congress intended by the use of the word "lawful" to apply the same consequences to a tariff that had taken effect under a streamlined process without any determination of lawfulness by this Commission. The only legislative history concerning this subsection, which is quoted in footnote 11 of the *NPRM*, suggests that the intent of Congress in adopting Section 204(a)(3) was to "speed up FCC action," not to abridge the substantive rights of customers.

In paragraph 12, the Commission suggests an alternative interpretation of "deemed lawful" that would treat this phrase as establishing a presumption of lawfulness that a party seeking suspension or rejection of a streamlined tariff would have to overcome. McLeod believes that this interpretation is more consistent with Congressional intent. This interpretation would be consistent with speeding Commission review and reducing the obstacles that LECs face in changing their tariffs, without reducing the legal rights or protections ultimately available to customers.

As suggested in paragraph 12, the interpretation of "deemed lawful" in the Act should be harmonized with Section 1.773(a) of the Commission's rules, which specify certain classes of tariff filings that are "considered *prima facie* lawful." The significance of this phrase is that tariffs subject to this treatment will not be suspended by the Commission unless a petitioner meets a four-part standard equivalent to the standard for granting a preliminary injunction or stay of an agency action.

McLeod agrees that streamlined tariffs filed pursuant to Section 204(a)(3) should also be considered *prima facie* lawful, but suggests that the Commission should adopt a somewhat different standard for suspending such tariffs based on the fact that local exchange carriers continue to have market power. Tariffs filed pursuant to Section 204(a)(3), unless they fall within one of the existing classifications set forth in 47 CFR § 1.773(a)(iii)-(v), should be subject to suspension if a petitioning party demonstrates that the tariff more likely than not will be found unlawful after investigation. This standard would (in contrast to current law) place the burden of persuasion on the party seeking suspension, rather than on the LEC seeking to make a tariff filing effective. This would effectuate the Congressional directive that these tariffs be "deemed lawful," without removing pre-effective review as a potential remedy in all but exceptional cases.

III. TARIFFS ELIGIBLE FOR STREAMLINED FILING (*NPRM* SECTION III)

A. Streamlined Filing Should Be Limited to LEC Tariffs That Increase or Decrease Existing Rates (Para. 17)

Section 204(a)(3) of the Act, by its terms, provides that streamlined LEC tariff filings "shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed" in absence of Commission action. The Act does not provide any notice period for tariffs other than those proposing an "increase in rates" or a "reduction in rates." The Commission's tentative conclusion in paragraph 17 of the *NPRM* that this subsection should be construed to apply to all LEC tariff filings proposing changes in terms and conditions of existing services, even if there is no rate increase or decrease, is contrary to the express and clear language of the statute. The Commission should apply the statute according to its terms, and determine that

only tariffs filing increases or decreases in rates are subject to streamlined treatment.[1] A tariff containing both increases and decreases should be subject to a 15-day notice period, although (as noted in para. 26 of the *NPRM)* a LEC that desires to decrease rates always has the option of doing so in a separate transmittal from any increases. Further, if the Commission does not restrict streamlined filing to rate increases and decreases alone, then the 15-day notice period should apply to all tariff filings containing changes in terms and conditions, unless the LEC certifies that no change to the tariff could conceivably result in anything other than a decrease in rates for all affected customers under all possible conditions.

B. Tariffs That Require Changes in Commission Rules or Policies Should Be Excluded from Streamlined Treatment (Paras. 18, 25)

Congress surely did not intend to allow streamlined treatment of tariff filings as a device to allow LECs to evade established rules, orders, or policies of the Commission. The Commission's rules should make clear that streamlined filing is not applicable to any tariff that requires a waiver of any Commission regulation or order, unless the waiver has been granted prior to the filing of the tariff. In addition, the Commission should adopt its proposal in para. 25 of the *NPRM* to require LECs to submit a legal analysis with each streamlined tariff filing. The Commission's rules should specify that this analysis must disclose any previous Commission decision[2] holding any similar tariff filed by the same LEC or any other LEC unreasonable, or interpreting any Commission regulation

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[1] This is not inconsistent with the first sentence of subsection 204(a)(3), which refers to "a new or revised charge, classification, regulation or practice[.]" The imposition of a new charge in connection with an existing service is a form of rate increase.

[2] This should specifically include decisions made by the staff pursuant to delegated authority, even if these decisions are subject to pending petitions for review and therefore are not technically "final."

or policy in a manner inconsistent with the filed tariff; and any pending petition, complaint, or other proceeding before the Commission that calls into question the legality of any tariff similar to the proposed tariff. Failure to make such disclosure, or an incomplete disclosure, should be *prima facie* grounds for rejection of the tariff.

This suggestion results from McLeod's recent experience in opposing a U S West tariff transmittal (No. 629, filed June 1, 1995). This transmittal proposed changes in access tariff regulations that would have required resellers of Centrex service to pay *switched* access charges on all interstate calls originated or terminated via special access facilities connected to a U S West Centrex service. U S West claimed that this tariff revision was required to be consistent with the Part 69 access rules. It failed to disclose, however, that the Common Carrier Bureau had construed the access charge rules and reached precisely the opposite conclusion in a formal complaint proceeding, *Enhanced TeleManagement, Inc. v. Northwestern Bell Tel. Co.*, File No. E-89-183, 8 FCC Rcd. 4188 (1993). It also failed to disclose that the applicability of access charges to Centrex resellers was the subject of a petition for declaratory ruling filed by U S West with the Commission in 1988 which was still pending at the time the tariff was filed (and, indeed, is still pending at this writing).[3] In the event, other parties advised the Common Carrier Bureau of these matters in petitions to reject or suspend, and the Bureau rejected the transmittal.[4] Under a streamlined tariff process, however, parties affected by a transmittal such as this would be under an extraordinary

[3] Mountain States Tel. & Tel. Co., Northwestern Bell Tel. Co., Pacific Northwest Bell Tel. Co., Petition for Declaratory Ruling: *Application of Switched Access Charges to Centrex-Based Resellers*, dated November 2, 1988.

[4] *U S West Tariff F.C.C. Nos. 3 and 5, Transmittal No. 629*, 10 FCC Rcd. 13708 (Comm. Carr. Bur. 1995) (petition for review pending).

burden to bring the inconsistent decisions to the Bureau's attention soon enough for it to act within the statutory notice periods. It seems reasonable to place an affirmative disclosure burden on the LEC to preclude any attempted end-run of Commission rules and policies.

IV. STREAMLINED TARIFF ADMINISTRATION (*NPRM*, SECTION V)

A. The Commission Should Require Electronic Filing of and Electronic Access to LEC Tariffs

McLeod strongly supports the Commission's suggestion that it develop an electronic filing system for tariffs, and require all LECs to post their tariffs electronically. In light of the short period allowed by statute for review of streamlined tariffs, McLeod suggests that the Commission also require that any tariff be made available to the public via the electronic filing system no later than 12 noon, Eastern time, on the day of filing. McLeod believes that software engineering firms, rather than telecommunications providers, are the most qualified entities to design and operate a system of this nature, and suggests that the Commission solicit proposals from such entities. Certainly, many systems that allow convenient public access to large volumes of data can be found at many sites on the World Wide Web, and Internet access to filed tariffs would be an ideal means of permitting the public effectively to monitor and respond to streamlined tariff filings.

McLeod supports the suggestion in para. 26 of the *NPRM* for e-mail notice to interested parties when a tariff is filed. A distribution list for each LEC could be maintained using readily-available mailing list management software, such as the program that the Commission already uses for automatic distribution of the Daily Digest. The Commission should require the filing LEC to send an e-mail message to the distribution list at the time it files a tariff, so that no Commission staff resources would have to be devoted to the notice procedure.

B. The Commission Should Expand its Use of Post-effective Tariff Review, but Not Rely on it Exclusively

In para. 23 of the *NPRM*, the Commission inquires whether it should adopt a policy of relying "exclusively" on post-effective tariff review, at least for some types of tariff filings, in lieu of its current practice of relying "primarily" on pre-effective review. McLeod would strongly oppose any policy of relying "exclusively" or even "primarily" on post-effective review; nonetheless, it would support a shift in practice towards more extensive use of post-effective review, and somewhat less reliance on pre-effective review, as a necessary measure in an era of streamlined tariff filings.

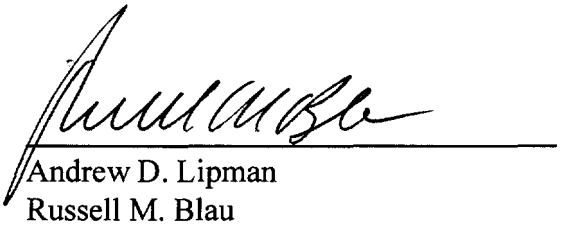
McLeod proposes that the Commission adopt a flexible policy under which the agency can determine to investigate a tariff under Section 204(a) or 205(a) either before or after its effective date, depending on the circumstances. As a practical matter, it seems unlikely that the Bureau staff would be able to perform any detailed pre-effective review of the great majority of tariffs filed under the streamlined process, but the Commission should not tie its own hands by eliminating (or even dramatically limiting) the opportunity to perform such review in an appropriate case. Certainly tariffs that pose conflicts with past policies or orders, as described in Section III.B of these Comments, would be prime candidates for pre-effective review.

V. CONCLUSION

For the foregoing reasons, McLeod respectfully urges the Commission to adopt rules that will preserve a meaningful opportunity for affected customers to challenge apparently unlawful tariffs. Streamlined filing should not be interpreted as limiting customers' remedies in the event that a tariff is eventually found unlawful. Streamlined treatment should apply only to rate increases and

decreases, not changes in terms and conditions. Filing carriers should be required to disclose any inconsistency between a tariff and existing Commission rules, orders, or policies, as well as any pending proceedings that might affect the tariff. The Commission should adopt an electronic tariff filing system to speed public access to tariff information, and should retain the flexibility to conduct pre-effective review of particular tariffs when warranted.

Respectfully submitted,



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